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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1150

JOHN C. PARENTI,

Petitioner,

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

DOCKET NO. _____

JOHN C. PARENTI,

Petitioner,

vs.

UNITED STATES OF AMERICA

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES:

The petitioner, John C. Parenti, respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Third Circuit entered in these proceedings on December 26, 1972.

OPINION BELOW

The opinion of the Court of Appeals, as yet unreported appears at Addendum A, *infra*, pp. A1.

The Trial Judge's opinion referred to by the Court of Appeals denying petitioner's motion for acquittal, or, in the alternative, a new trial, is reported at 326 F. Supp. 717. A copy of the Trial Judge's opinion appears at Addendum A, *infra*, pp. A1.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on December 26, 1972, see Addendum A, *infra*, pp. A30. The Honorable William J. Brennan, Associate Justice of this Honorable Supreme Court, on January 9, 1973, signed an order extending the time for petitioner to file his petition for *certiorari* to February 24, 1973. This petition for *certiorari* was filed within the time aforesaid.

The jurisdiction of this Court is involved under Title 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Did the Court of Appeals err in not finding the petitioner's rights and privileges as provided by the 4th, 5th and 6th Amendments to the Constitution of the United States in his trial in the District Court had been violated?

2. Did the Court of Appeals err in not finding that the petitioner's aforesaid constitutional rights and privileges had been violated by the District Court permitting the government presenting to the jury, over petitioner's objections, its net-worth schedule in such a confusing, questionable, unsubstantiated and haphazard method of presentation, so that due process and a fair and just trial was not obtained by petitioner?

3. Did the Court of Appeals err in not finding the District Court Trial Judge did not (as he should have) in his charge to the jury (a) instruct it that before it could use the net-worth method it first had to find the petitioner's books and records inadequate to ascertain petitioner's correct income, and (b) should also have explained to the jury the petitioner's explanation of his net-worth as he did for the government?

4. Did the Court of Appeals err in not finding the petitioner's aforesaid constitutional rights had been violated by the trial court letting into evidence, through the petitioner's accountant, certain admissions as to his income and the presentation to the government's agents and the jury a net-worth statement, obtained out of the presence of the petitioner and without his consent?

(Petitioner has attached hereto a copy of his assigned Errors to the Court of Appeals and refers to same.) Addendum, pp. A31, Exhibit C.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment IV.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but, upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

Constitution of the United States, Amendment V.

"No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

Constitution of the United States, Amendment VI.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

The government charges that the Petitioner willfully evaded payment of income tax with respect to the years 1961, 1962 and 1963. In the three-count indictment each year being represented by a single count, the government charges that Petitioner's failure to report the amount alleged is a violation of Section 7201 of Title 26, U.S.C. The Petitioner was tried before the United States District Court for the Eastern District of Pennsylvania in a lengthy trial and found guilty on all three counts of the indictment. Subsequently, the Petitioner filed a Motion for Judgment of Acquittal and a Motion for a New Trial. These Motions were briefed and argued to the Trial Judge. On March 31, 1971 the Trial Judge filed an Opinion and Order in which he denied the Petitioner's Motions. Subsequently, on February 8, 1972, the Petitioner was sentenced to a term of one year in prison and fined a total of $18,000. The Petitioner then filed an Appeal to the United States Court of Appeals for the Third Circuit.

The government proceeded against the Petitioner in this case using the so-called net-worth method to establish an alleged understatement of income. The government's final calculations as embodied in its so-called summary charts alleged that the Petitioner under-reported his income for the year 1961 in the amount of $27,904.87, and for the year 1962 in the amount of $17,964.79, and for the year 1963 in the amount of $16,773.83. The facts will reveal that for the years in question the Petitioner reported substantial amounts of income and paid taxes on those amounts. The Petitioner reported income for the year 1961 in the amount of $42,379.54, for the year 1962 in the amount of $40,720.18, for the year 1963 in the amount of $38,127.50.

The method utilized by the government to endeavor to establish the alleged unreported income is the so-called net-worth method. By this method the government endeavors to establish increases in the Petitioner's net worth for the tax periods in question and by circumstantial inference the increases in the net worth of the Petitioner are equated with taxable income. The government endeavors to establish a starting point for the net worth of the Petitioner at the beginning of the tax period in question. The government also endeavors to prove all of the expenditures of the taxpayer for the periods in question. By inference the resultant increase in the Petitioner's net worth is added to the so-called non-deductible expenditures and the resultant figure by circumstantial inference represents the alleged income for the Petitioner for the period in question. If this figure exceeds the amount reported by the Petitioner, the government contends that the difference represents unreported income to the Petitioner and endeavors to assess a criminal liability for the amount allegedly unreported. This method is fraught with difficulty since it is an artificially contrived calculation resting on circumstantial inferences.

The government herein presented large numbers of witnesses, a great majority of which were offered to prove expenditures by the Petitioner and his wife. In addition, there are other witnesses who testified to various and sundry business transactions having relevance to the Petitioner's net worth. There was also testimony from various Internal Revenue Agents relevant to certain issues involved. The government's case culminated in the presentation of two Internal Revenue Agents who took part in the preparation of a number of so-called summary charts which the government introduced into evidence. These agents testified as to the preparation of the charts and the

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contents thereof and endeavored to prove from these charts and figures the alleged deficiency in income attributable to the Petitioner for the years in question.

It would be a gross waste of the Court's time to endeavor to go into each witness' testimony at this point. Where a witness' testimony becomes relevant to an issue raised in the brief, it is therein discussed. In this section, Petitioner merely endeavors to summarize in a general manner the totality of the government's case.

It should be noted that in the presentation of the government's case, the government over objection of the defense counsel saw fit to introduce not only expenditures of the Petitioner for the years for which he was indicted but also for pre-indictment years and in some instances going back ten or fifteen years to prove expenditures that had taken place in those prior years. The government's presentation was one which lacked any degree of order or system in that the evidence was presented in a rather haphazard and confusing manner. To illustrate, the government did not present their evidence in a chronological order. That is, they did not present the evidence for each year in any logical sequence. A witness would testify to a matter in 1961; the next witness would testify to a matter occurring in a pre-indictment year and a third witness might testify to a matter occurring in 1963. There was no attempt by the government to present evidence in chronologically, orderly fashion. Furthermore, the government did not endeavor to present its evidence in a topically orderly fashion. That is, on one day a witness would testify to certain aspects of a transaction and two weeks later, another witness would testify to a different aspect of the same transaction. In sum, it can be stated that the government's evidence was illogical, irrational, haphazardly presented, the totality of which was manifestly confusing and incomprehensible for the jury to understand.

Whatever problems that may be inherent in the presentation of this type of case should not be allowed to work to the detriment of a defendant.

The evidence in this case will reveal that the Petitioner herein was involved in various and sundry businesses during the period in question. He was the owner of a used car business referred to as Market Motors, which business was disposed of by the Petitioner in July, 1962. The Petitioner was also a principal in a corporation which owned a restaurant business for part of the years in question. The corporation being referred to as the 5th and Washington Corporation trading as the Redwood. The record will also reveal that the Petitioner was involved in a corporation known as the South Mountain Grove which owned real estate and was also involved as a stock holder in a corporation known as Bethlehem Leasing, which was a real estate investment corporation.

The testimony will also reveal that for the years in question the Petitioner not only reported income from the above mentioned business enterprises but also reported on his tax returns under the heading of "miscellaneous income" sums that he had won from personal gambling. The amounts reported as gambling income were substantial for each of the years in question. The testimony by the government witness O'Malley who was the Petitioner's accountant for the years in question revealed that this income from gambling involved personal winnings by the Petitioner from his visits to the track. (Petitioner's pretrial motion, designated partial transcript dated June 17, 1969, testimony of William J. O'Malley, pp. 1-30. N.T. 1171-N.T. 1206).

It is relevant at this point to note that during the course of its investigation, the government agents had induced the Petitioner's accountant to prepare for them a

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net-worth statement of the Petitioner for all of the tax years in question. That this net-worth statement referred to extensively during the course of the trial was relied upon by the government more than any other document. (Petitioner's pretrial motion, designated partial transcript dated June 16, 1969, pp. 38-56.) This is government Exhibit 243.

The evidence will also reveal that O'Malley who prepared the net-worth statement admitted on the witness stand under cross-examination that the document was riddled with errors, omissions, miscalculations and various and sundry other errors and that the errors and omissions resulted from mistakes on the part of O'Malley and was not attributable in any way to the Petitioner (N.T. 1194-N.T. 1196; N.T. 1204-N.T. 1206; N.T. 1435-N.T. 1530; N.T. 1569-N.T. 1581).

Moreover, a reading of the evidence will reveal that a number of substantial and glaring inconsistencies arose in the government's own case. In general it should be noted that the government's own evidence was inconsistent, contradictory, in relevant and material aspects. For example, the government witness Myers testified that he was not owed any money by the Petitioner for the taxable years in question. The government disregards their witness' testimony and insists that a liability of $19,700 did exist and that said liability somehow became liquidated during the period in question thereby resulting by inference in the imputation to the Petitioner of income in the amount of $19,700 (N.T. 1137).

The same witness testified that he lent monies to the Petitioner during the years in question (N.T. 1037-N.T. 1041). This testimony which is favorable to the Petitioner is totally disregarded by the government in their chart computation. There occurred various other important inconsistencies and in each case the government with-

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out any foundation chose to disregard evidence that was favorable and to utilize only that which was unfavorable.

Further, the government imputes to the Petitioner during the period in question the sum of $20,000 which results from the alleged reduction of liabilities allegedly owed to the Petitioner's deceased father. The government does not even contend that these liabilities were liquidated by the expenditure on the part of the Petitioner of cash or other assets. They merely assert erroneously that if these liabilities were no longer in existence that the Petitioner automatically would be charged with income under the net-worth theory.

After the government had presented all of its fact witnesses, it prepared summary charts and presented the testimony of two of its agents who related the content of these charts. The charts referred to consisted of some 32 pages of intricate mathematical computations which tend only to further confuse the jury (Government Exhibits 324-338 inclusive). Moreover, the charts purport to be a summary of the entire government case. This assertion by the government is palpably false in that the government chose to select from its own case only items favorable to it and entirely left out whole segments of its own evidence which contain items favorable to the Petitioner. The government in other instances adopted techniques and procedures completely at odds with their own evidence in order to arrive at an alleged understatement of income on the part of the Petitioner.

The government endeavored to show that the Petitioner herein was allegedly involved in illegal gambling activities from which he derived income. It seems apparent that this thought permeated the government's thinking and was the real reason for the bringing of this criminal action. It should be clearly pointed out that

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the record in this case does not substantiate in any manner an inference that this Petitioner was during the periods in question involved in the operation of any illegal gambling enterprise. The government offered testimony from one witness, Ludwig Iskra, the sum total of whose testimony can be characterized as conflicting, unintelligible, coerced and of no probative value (N.T. 1585-N.T. 1640). Outside of this one witness who contradicted himself on the crucial issue of whether he was the proprietor of a gambling operation as contrasted to the Petitioner, there was absolutely no credible evidence to conclude that this Petitioner had made any money from any illegal gambling activity.

By way of defense the Petitioner offered testimony which established clearly with documentary corroboration that he had in fact borrowed sums of money during the period in question the total amount of which was $15,000 (N.T. 3542-N.T. 3707). That when these loans were taken into consideration together with a proper handling of the items in the government's own case, there would be no under-reported taxable income by the Petitioner. The Petitioner's witnesses' testimony concerning the alleged loans was uncontradicted, clear, concise and was in each case corroborated by documentary evidence showing the transference of the money by checks which was in each case verified and corroborated by the records of the banks involved (N.T. 3542-N.T. 3707). The defense called as its last witness, an accountant who testified as an expert witness. In support of his testimony there was introduced into evidence two charts prepared by the defense expert (Defendant's Exhibits 27 and 28). These charts were prepared in a manner that was easy to comprehend. The expert for each year in question started with the income deficiency as alleged by the government. He demonstrated that it was necessary to make certain

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adjustments to the government figures. These adjustments were based upon proper accounting procedures and were based upon evidence in the government's own case which the government had failed to utilize in its charts. That when these adjustments were made as they properly should have been made by the government, had the government desired to be fair, there would be no income shortage at all for any of the years in question (N.T. 3787-3825; Defendant's Exhibits 27 and 28).

The testimony of the defense expert as to the proper handling of the various items in question leads inexorably to the conclusion that the government's evidence clearly failed to establish that there were any increases in the Petitioner's net worth attributable to taxable income derived during the period. This witness' testimony displayed with remarkable clarity the manner in which the government manipulated figures and twisted evidence in order to reach the conclusion that they desired. His testimony demonstrated the manner in which the government's charts were forced and contrived contrary to the evidence, proving that the figures and the conclusions reached by the government were improper. This amply demonstrates the manner in which charts and the figures thereon can be manipulated to arrive at a conclusion entirely unsupported by the evidence.

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REASONS FOR GRANTING THE WRIT

1. The Federal questions herein have been decided below in a way which is not in accord with the applicable decisions and opinions of this Supreme Court, they being:

Marion L. Holland v. United States, 348 U.S. 121, 75 S. Ct. 127, 54-2 U.S.T.C. No. 9714.

Edward B. Calderon v. United States, 348 U.S. 160, 75 S. Ct. 186, 54-2 U.S.T.C. No. 9712.

Daniel Smith v. United States, 348 U.S. 147, 75 S. Ct. 194, 54-2 U.S.T.C. No. 9715.

David Friedberg v. United States, 348 U.S. 142, 75 S. Ct. 138, 54-2 U.S.T.C. No. 9713.

which cases have provided guidelines and safeguards for use by the Federal government and Courts in income tax cases where the use of the Net-Worth Method of proof is involved.

2. The decisions below conflict and violate the provisions of the 4th, 5th and 6th Amendments to the Constitution of the United States pertaining to unreasonable searches and seizures, lack of due process, equal protection of the law, and a fair and just trial.

3. The questions presented are of great importance in the administration of the Federal Tax laws; and settlement of these "often-arising" questions by this Supreme Court is in the public interest, for the petitioner's case is representative of a problem confronting many taxpayers and citizens.

The questions are essentially questions of law, and some law and facts, as well as interpretation of the Federal Constitutional Amendments.

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The United States Court of Appeals in its opinion and decision refers to the Trial Court's opinion and approves the findings therein "in *toto*" so the petitioner bases his petition on errors allegedly contained therein.

After the trial the petitioner filed with the Trial Court a Motion for Judgment of Acquittal or, in the alternative, a new trial. The Trial Court, in turn, filed a lengthy opinion in an attempt to answer and refute the petitioner's points and contentions, and at the end thereof held that ". . . Having again considered the Record, as requested by the defendant, we are irresistibly drawn to the conclusion that his motion is without merit. . . ." See Addendum page A27.

Naturally the petitioner feels and submits that the Trial Court erred in its findings and interpretations of law and constitutional provisions, which makes for reversible and prejudicial errors.

These points and alleged errors are as follows:

(a) "Inspection."

The petitioner first contended that the Court erred in denying the petitioner's motion for inspection and disclosure by the government of all exculpatory material, information and evidence, relying heavily on *Brady v. Maryland*, 373 U.S. 83 (1963). The Trial Court stated, ". . . Apparently the defendant neither suspects or knows of the existence of any such exculpatory material in the possession of the government either now or at the time of trial. On the contrary, the government represented and presently represents that it had and has no exculpatory material or evidence in its possession or control."

Obviously, the petitioner would and must have had suspicions that the government held such exculpatory matter, otherwise such a motion would not have been filed.

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The petitioner contends that the Trial Court at that time or at some time during the trial should have enforced his motion and, at least, examined all of the government's relative files. This contention is borne out by after-discovered evidence.

One of the government's witnesses was Fred Mathern, whose memory became faulty at the trial and his testimony was stricken out. However, the Trial Court permitted the government to put into evidence a typewritten statement over objection, which read as follows:

"December 6th, 1962

"This is to duly swear that I (John Parenti of 736 S. 25th St. Allentown gave to Fred Mathern in the year of 1961 various sums of money totaling six thousand nine hundred dollars ($6900).

/s/ John C. Parenti

Sworn to and subscribed before me
this 7th day of December 1962.

/s/ Charles Ward
Bethlehem, Pa.
My commission expires
11/18/66"

The government was attempting to use this statement as a loan of $6,900.00 to Fred Mathern by John C. Parenti in 1961 (N.T. 1667-N.T. 1669 and Exhibit G-90).

Shortly after petitioner's trial was ended the government indicted Fred Mathern for the crime of perjury based upon a sworn statement he had given its agents pertaining to the above transaction. Mr. Mathern was found guilty and was sentenced to prison. During his trial he mentioned he was represented by a certain Certified Public Accountant, Philip T. Varricchio, in his own tax case in-

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cluding the year 1961 (which is the year he was to have received $6,900.00 from the petitioner). The Accountant has produced a copy of the Revenue Agent's findings and audit report which disclosed that the Agent did not credit Mr. Mathern with the receipt of this cash from Mr. Parenti in 1961 in his cash-expenditures method of computing Mathern's taxable income. A copy of said report is contained in the Addendum hereto on pages A40-A41.

This document, the petitioner submits, was exculpatory material in the possession of the government at the trial of petitioner, which should have been produced.

Also, shortly after petitioner's trial and conviction the Internal Revenue Service made jeopardy assessments against the petitioner for the 10% wager taxes for the years 1952 to 1960 totaling some $60,000. Their theory during the income tax trial was that the alleged additional unreported income came from petitioner's gambling and operating a wager business. This certainly indicates that the government had this information at the petitioner's income tax trial and is greatly in conflict with what they attempted to prove in it that he had no substantial amount of cash on hand at its starting point, to wit, December 31, 1960. One can lawfully infer that if petitioner had that much cash available, he must have had a huge amount more from the business, if it be true he was in such a business.

Petitioner therefore submits that this was exculpatory material in the possession of the government which should have been divulged, and which in turn would have ruined its starting point of net worth and its entire schedule of assets.

(b) (Miranda Warnings) (Constitutional Warnings)

The Trial Court in its aforesaid opinion states:

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"Using the so-called 'net worth method,' the government procured from the defendant's accountant (O'Malley) to whom the government agents were directed and referred by the defendant, a net worth statement, cash flow sheets, summary sheets and statement (G-231, 232, 235, 236, 238, 239, 240 and 243). To the use and admission of these documents, and particularly the networth statement (G-243) the defendant objects, contending that when the investigation became criminally oriented and focused upon the defendant, he was entitled to the Miranda warnings. *Miranda v. Arizona*, 384 U.S. 456 (1966). Defendant concedes that the present state of the law does not require the Miranda warnings, whereas here, there was no custodial interrogation. However, he argues that the rationale of Miranda and related cases suggests that the government owes to an individual who is suspected of income tax evasion some type of warning albeit something less than the Miranda warnings. However, all cases relied upon by the defendant involved either active deception by government officers (or agents) or custodial interrogation . . ." etc.

What the petitioner contends and argues is that the special agents' violated the petitioner's rights and privileges under the 4th and 5th Constitutional Amendments by making an illegal search and seizure of petitioner's net-worth statement and sending Accountant O'Malley to procure the petitioner's signature thereto. The sole thought of the Special Agent "Singer" could only have been to use O'Malley as his agent to beguile the petitioner into signing the net-worth schedule and thereby committing him to commission of a crime. He should have at this time, if not before, given the Accountant the required Constitutional warnings such as he and the petitioner did not have to give any net-worth statement or information that might incriminate him or them, that they might be used to prosecute them in a Court of law, that he and they had a right

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to counsel, and after that to have had the petitioner given such warnings before he signed the net-worth statement, which was given to Special Agent Singer. It was a clear case of guile, trickery and deception and the Trial Court should not have permitted its production into evidence over petitioner's objections.

The petitioner further argues that the Trial Court erred in not submitting to the jury as a factual question whether or not the petitioner's net-worth statement, prepared by his Accountant, and submitted to the government, was obtained from the petitioner and his Accountant as a result of fraud, guile, trickery and deceit.

(c) The Fred Mathern Exhibit (G-90).

The Trial Court states, "The defendant contends that the Court erred in admitting into evidence G-90 (recited above)."

The petitioner argues that the Trial Court erred when it says ". . . whether it was a gift, a loan or some other type of transaction which can be conjured upon by one's imagination was for the jury. The document duly signed by the government speaks for itself. It was for the jury to interpret it. The government was under no obligation and indeed had no right to offer interpretative evidence after establishing that the defendant signed the document." The petitioner differs with this explanation on the grounds that the burden of proof was upon the government, if it wanted to use it in its net-worth schedule, that it was an item pertaining to taxable income and was exactly what it stood for; otherwise, it should not have been admitted into evidence. The jury has no right to conjecture anymore than does the Court or government. The element had to be proven beyond a reasonable doubt.

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(d) Special Agent Singer's testimony.

It contended by the petitioner that Mr. O'Malley was only the petitioner's agent so far as indicating to the Agents how he prepared the petitioner's income tax returns and from whom and what, the information was obtained. That the agency stopped there and that the Accountant did not have the power and authority to make admissions against the petitioner outside of his presence nor without his consent, which he did not have; that the same relates to the giving of the incorrect net-worth statement to the agents. Particularly so when it was done without Constitutional warnings which should make such admissions involuntary and suppressible, and obtained by the use of guile and deceit. It is submitted that there was a psychological compulsion practiced upon the petitioner and his Accountant which made them subject themselves to the government agents. See Mr. Justice Douglas' dissenting opinion in *Couch v. United States,* 93 S. Ct. 611, 620.

(e) Government Charts.

The Trial Court states, ". . . The defendant contends that he was prejudiced by the admission of Government Charts (G-324-338); and finds that to have denied the use of the charts would obviously been an error.

The petitioner argues that it was error to admit them due to the great number of them, the size of them and the numerous figures and explanations contained therein which would have induced the jury to believe them whether they read them and understood them or not. That these admissions only added to the confusion of the jury instead of aiding it.

Further, that the charts contained incorrect and misleading items that should not have been entered into them,

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and that they were admitted without sufficient and adequate explanations thereof by the Trial Judge in his "charge." All of which was in conflict with the aforesaid "Holland" cases. The Trial Court should have explained, in detail to the jury, the petitioner's contentions as to legality of the net worth as well as to the government's case.

This is particularly so as the government summary charts were not a summary of all of the evidence, but were in fact, prejudicial, biased and selective self-serving documents prepared by the government. These charts, or the makers of them, selected only those parts of the evidence from the government case which were favorable to it, and left out those aspects that were unfavorable to it. Furthermore, in the preparation of these charts, the government agents set themselves up as fact-finders by selecting evidence that they wanted in the charts and completely leaving out other evidence favorable to the petitioner. This was a direct usurpation of the jury's functions.

(f) Net-Worth Method

The Trial Court, in its opinion, calls attention that the government through the testimony and others, established that the petitioner's liabilities decreased in 1961, 1962 and 1963 as follows:

> (1) An alleged mortgage payable to the defendant's father in the amount of $10,000.00.
>
> (2) An alleged loan payable to Norman Meyers in the amount of $19,700.00.
>
> (3) An alleged loan payable to the defendant's father in the amount of $10,000.00.

That the petitioner argued that the government failed to establish that the funds with which these liabilities were

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liquidated specifically came from taxable income. That in a prosecution of this kind such precise and specific burden does not rest upon the government—that if it establishes a likely source that is sufficient under *Holland*. The Trial Court further states it was up to the Jury to find or not find that the increase was from currently taxable income, from a cash hoard or from under the rug, the mattress or the safe deposit box as petitioner's counsel suggested in his opening remarks. Inasmuch as the Trial Court was so impressed with this cash hoard or funds on hand, it should have called the Jury's attention to it as a possibility of a source of non-taxable funds. Especially so as it was in line with the government's charges of the petitioner being a gambler and operator of a wagering business. It is well known that a person in such a business has to have at all times large amounts of cash as "banks" and the courts have and must take judicial notice of the same.

The petitioner further contends that the said three items represent post-offense admissions which were not corroborated by law (*Smith* case).

The evidence introduced by the government to prove its corroboration of these items actually and in reality disaffirmed, disavowed, and demolished their even existence.

Where the government proceeds on a net worth theory, it is essential that it establish that the increase in a defendant's net worth (either by increases in assets or decreases in liabilities) were the result of the acquisition or expenditure by the defendant of cash or its equivalent. In the present case, the government merely alleges that the petitioner no longer owed certain liabilities but offered no evidence whatsoever that the liabilities were liquidated by expenditure of cash or its equivalent. The resultant "increase" in the petitioner's net-worth by virtue of the

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elimination of these liabilities cannot be utilized as the basis for an inference that such "increase" in net worth resulted from the receipt of taxable income by the petitioner.

The aforesaid three liabilities totaled $39,700.00. The entire alleged income deficiency computed by the government was $62,643.00. The liabilities mentioned are approximately two-thirds of the entire alleged income shortage for the three year period.

Regarding the liabilities payable to the petitioner's father, Armando Parenti, the Record indicates that the father had passed away in 1955, some six years before the first tax year in question herein. The record of the deceased father's estate, put into evidence by the government does not show any indication of these debts. That his estate was of the approximate value of $3,000.00. Also that his tax records reflected that he had not earned any large sums of money or compensation.

In respect to the mortgage payable (unrecorded allegedly) the records of the County wherein the property was located showed that no mortgage whatsoever existed. It should be noted that all of the petitioner's and his wife's real estate were held by them as Tenants By the Entireties and Mrs. Parenti would have had to join in the mortgage to make it a legal instrument. This, of course, was not proven.

With respect to the loan payable to Norman Meyers, Mr. Meyers was called as a government witness, and testified on cross-examination, clearly and unequivocally, that Mr. Parenti did not owe him the sum of $19,700.00, nor for that matter, any sum whatsoever. He further testified that he received no money from the petitioner; and that in 1962 he had loaned Mrs. Parenti $6,500.00 through Mr.

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Parenti which had not been paid off (N.T. 1035-N.T. 1065; N.T. 1137).

Mr. Meyers called attention of the Trial Court that he had been a petitioner in the United States Tax Court regarding some alleged deficiencies for the same years and that the Court therein found in his favor on many of the items involved that are in petitioner's matter and that he was an honest witness. It also found Mr. Meyers did not receive any money from Mr. Parenti in 1962 nor did Mr. Parenti forgive a debt to him. It is suggested that the Trial Court should have taken judicial notice of the same; also that it may have been *res adjudicata* as to the government and Mr. Meyers on some of the items involved herein.

The existence of these three liabilities and the subsequent non-existence of them, come solely from the net worth statement submitted by the petitioner's Accountant, there being no corroboration of the existence of these liabilities nor their subsequent non-existence. As a matter of fact, the evidence, on the contrary, clearly indicates that these liabilities did not in fact and reality exist in the first place (the statement being defective) and, secondly, that there was no way possible that these liabilities could have been paid off by the petitioner.

The elimination of these liabilities by the government on their charts amounts to nothing more than an improper and artificial increasing of the petitioner's net worth without there being one *scintilla* of evidence to prove that the petitioner actually discharged these liabilities by payment. Absent such evidence, the jury was asked arbitrarily and capriciously, to find that the liabilities were liquidated by the payment of cash, and that from that inference the Jury was then further asked to arbitrarily find a resultant in-

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crease in the petitioner's net-worth. From these two improper inferences, the Jury was further finally asked to infer that the artificial increase in the petitioner's net-worth resulted from the receipt by the petitioner of taxable income. The inferences and presumptions that the Jury was asked to draw are clearly unconstitutional, irrational and arbitrary, in that the presumed fact was not more likely than not to flow from the proven fact on which it was made to defend. See *Leary v. United States*, 395 U.S. 6.

In the *Leary* case, *supra*, this Court states as follows:

> "A criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proven fact on which it is made to depend."

It is submitted to the Court that the inferences upon which the net-worth theory is predicated are "irrational and "arbitrary" within the mean of the *Leary* decision, and as such are violative of the petitioner's rights to due process of law, there being no rational connection between the fact proved and the fact presumed. This is particularly true in the instant matter in respect to the handling of the petitioner's alleged liabilities and the creation of alleged income without any showing that the liabilities were diminished by payment.

Moreover, before even considering whether the net-worth presumptions are constitutional there exists even a more basic defect in the government's case. This defect lies in the fact that the government has artificially created an alleged increase in the defendant's net worth without offering any evidence to show that the alleged increase

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came from assets attributable to the petitioner. That is, the increase in the petitioner's net worth is a sham, since there is no evidence that the liabilities in question were ever paid off by the expenditure of monies.

The government improperly asks the Jury to infer that the alleged liabilities were paid off by monies of the petitioner since there is no evidence in the record whatsoever to indicate that such payment was made. Based upon this unwarranted inference, the government concludes that the petitioner's net worth increased by the amount of the liabilities which are alleged to be no longer in existence. The government then asks the Jury to further improperly infer that the alleged increase in net worth was attributable to taxable income. Here we have one improper inference piled upon another. We do not even have a "fact proven" upon which the ultimate fact presumption is based.

Clearly, the Jury should not be allowed to presume the "ultimate fact" without the government first establishing the "fact proven."

The defect in the government's case is even more glaring when consideration is given to the fact that there is evidence that one of the liabilities does not even exist and that the other liabilities are allegedly owed to the petitioner's father who was deceased many years before the alleged liability was eliminated.

Clearly, the Jury should not have been allowed to stack one inference on another for to do so was to allow them to conject the petitioner into a conviction.

If one subtracts the liabilities of $39,700.00 from the government's net-worth statement and then adds to it in 1962 the liability of $6,500.00 of Mr. Parenti to Mr. Meyers,

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and the huge amount of cash on hand, the Court and government would have to give the petitioner in the starting point and reduced thereafter, there would be no increases in net worth.

> See *Louis Feingold* No. 56214 P-H Memo T. C. 9/19/56 *United States v. Clark*, 123 F. Supp. 608 *Bodoglau, Admnx. v. Comm.*, 56-1 U.S.T.C. No. 9312 230 F.2d 336.

It is noted that the government's net worth is a hybrid method. Part of it is composed of accrual items basis and another part on the cash basis. The accounts receivable item did not allow for unrealized income.

Finally, it appears from the record that the government used two attorneys in the prosecution of petitioner during the trial, one of them being a trial counsel of the Regional Counsel's office of the Internal Revenue Service.

It appears that this is violation of statutory law, to wit:

> "The conduct and control of all Federal tax litigation except in the Tax Court of the United States, were vested in the Department of Justice by Executive Order No. 6166, pursuant to authority granted by the Act of June 30, 1932, C. 314, 47 Stat. 383, 413."

This appears to violate the "Accardi" doctrine in that the government and its agencies should follow and obey its own precepts.

The bars which guard the right to a "fair trial" such as is guaranteed by the Constitution, include court procedure, rules of evidence, and proper instructions to the jury, and those bars must not be lowered. *Miller v. United States*, 120 F.2d 968 (1941).

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The right to a fair trial may not be abrogated even if evidence of guilt is overwhelming. *Imber v. Craven*, 298 F. Supp. 795, *aff'd.* 424 F.2d 631, *Certiorari Denied* 91 S. Ct. 100, 400 U.S. 865, 27 L. Ed.2d 104.

The determination as to whether a trial is fair cannot be made until after trial has taken place. *White v. State of Tennessee*, 304 F. Supp. 661.

The government has the obligation of assuring that petitioner will receive a fair trial. *United States v. Cobb*, 271 F. Supp. 159.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

PAUL D. SULMAN

ROBERT M. TAYLOR

Attorneys for Petitioner

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Addendum "A"

Decision Rendered by Judge Troutman

[¶9613] United States of America v. John C. Parenti.

U. S. District Court, East. Dist. Pa., Criminal No. 23204, 3/31/71.—(326 F. Supp. 717.)

Louis C. Bechtle, United States Attorney, Philadelphia, Pa., for U. S. Benjamin R. Donolow, 1127 Land Title Bldg., Philadelphia, Pa., for defendant.

OPINION

Troutman, District Judge: Following an extended trial by jury, the defendant was found guilty of attempting to evade and defeat the payment of his 1961, 1962 and 1963 income taxes in violation of 26 U.S.C. §7201. The defendant now seeks a judgment of acquittal or, in the alternative, a new trial. In support of his motion, the defendant has submitted an extended brief raising multiple points not all of which are wholly consistent and some of which are partially duplicitous. We shall treat each point seriatim:

INSPECTION

I. The defendant first contends that the Court erred in denying the defendant's motion for inspection and disclosure by the Government of all exculpatory material, information and evidence. Relying heavily upon Brady v. Maryland, 373 U.S. 83 (1963), the defendant contends that the Court erred "in not requiring that the Government go through its file, and produce any and all exculpatory matter that may exist therein, and give same to the defendant as was requested." [1] He otherwise contends

[1] See page 16 of defendant's brief.

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that "• • • a defendant is entitled, as a constitutional right, to have any and all exculpatory material made known to him where such material or witnesses are known to the Government." [2] In another instance the defendant contends that it was the duty of the Court to require the Government "to expose its entire file" to the Court, "and it was then the duty of the Court to see if there was contained therein any material which could possibly be beneficial to the defendant, and • • • to require that the Government turn over all of this material to the defendant." [3]

NO EXCULPATORY MATERIAL

Apparently, the defendant neither suspects nor knows of the existence of any such "exculpatory material" in the possession of the Government either now or at the time of trial. On the contrary, the Government represented and presently represents that it had and has no exculpatory material or evidence in its possession or control.[4]

The defendant contends that the law relating to deliberate or bad faith suppression of evidence by the Government, of which there is no evidence, or its refusal to honor a proper request to produce, of which there is no evidence, somehow obligates the Government to expose its entire file to the defendant or at least to the Court for inspection and possible delivery to the defendant. The cases do not so hold. Certainly Brady, which involved a charge of murder and, the extra-judicial confession of an accomplice, did not suggest exposure of the Government's entire file. Thompson v. Dye, 221 F.2d 763 (1955), likewise a murder charge, involved the suppression of evidence re-

[2] See page 12 of defendant's brief.

[3] See page 17 of defendant's brief.

[4] See page 9 of Government's brief.

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garding the defendant's state of intoxication. Butler v. Maroney, 319 F.2d 622 (1963) involved a statement given by the defendant to the police regarding a struggle between the defendant and the victim at the time of the shooting. While the Brady doctrine has been refined in subsequent decisions, no case suggests that the defendant has the right, or the Court the obligation, to peruse, the Government's file to determine whether exculpatory material or evidence is contained therein. United States v. Keogh, 391 F.2d 138 (1968); United States v. Miller, 411 F.2d 825 (1969); Barber v. Warden, 331 F.2d 842 (1964); United States v. Manhattan Brush Company, 38 F.R.D. 4. The interests of justice would not be served by allowing the defendant unlimited access to and perusal of the Government's entire file, especially where, as here, the defendant knows of no exculpatory evidence which has been suppressed and the Government affirmatively represents that it has none.

MIRANDA WARNINGS

II. Using the so-called "net worth method," the Government procured from the defendant's accountant, to whom the Government agents were directed and referred by the defendant, a net worth statement, cash flow sheets, summary sheets and statement. (G-231, 232, 235, 236, 238, 239, 240 and 243.) To the use and admission of these documents, and particularly the net worth statement (G-243) the defendant objects, contending that when the investigation became criminally orientated and focused upon the defendant, he was entitled to the Miranda warnings. Miranda v. Arizona, 384 U.S. 456 (1966). Defendant concedes [5] that the present state of the law does not require the Miranda warnings where, as here, there was no "custodial" interrogation. However, he argues that the

[5] See pages 24 and 25 of defendant's brief.

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rationale of Miranda and related cases suggests that the Government owes to an individual who is suspected of income tax evasion some type of warning advice or notice albeit something less than the Miranda warnings. However, all cases relied upon by the defendant involve either active deception by Government officers (or agents) or custodial interrogation. The defendant's contentions have been overwhelmingly rejected by a great majority of the Courts. The basis for such rejection is best stated in the case of United States v. Squeri [68-2 USTC ¶9493], 398 F.2d 785 (1968), where at page 790 the Court said as follows:

> "Thus, we reject the view * * * that Internal Revenue Service agents must give Miranda warnings even though there is no custodial interrogation, if the investigation has reached the accusatory stage * * *. The fifth amendment prohibits the Government from compelling a person to incriminate himself. It was the compulsive aspect of custodial interrogation, and not the strength or extent of the government's suspicions at the time the questioning was conducted, which led the Court to impose the Miranda requirements with regard to custodial questioning. We believe that the presence or absence of compelling pressures, rather than the stage to which the government's investigation has developed, determines whether the Miranda requirements apply to any particular instance of questioning." (Emphasis ours.)

"FOCUS" TEST

The so-called "focus" test seems to have originated in Escobedo v. State of Illinois, 378 U.S. 478 (1963), and was rejected by the Miranda Court which reasoned as follows at page 444 (Fn. 4):

" ° ° ° questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way ° ° °

° ° °

" ° ° ° is what we meant in Escobedo when we spoke of an investigation which has focused on an accused ° ° ° ." (Emphasis ours.)

In United States v. Jaskiewicz [70-2 USTC ¶9616], 433 F.2d 415 (1970), also an income tax evasion case, the Third Circuit more recently rejected the "focus" test. In Mathis v. United States [68-1 USTC ¶9357], 391 U.S. 1 (1968), the taxpayer was in custody on an unrelated charge and the Government sought to apply the "focus" test in determining whether the defendant was entitled to the Miranda warnings. The Court rejected the Government's argument and applied the "custody" test. Likewise, see Orzaco v. Texas, 394 U.S. 324 (1969); Kohatsu v. United States [62-2 USTC ¶9715], 351 F.2d 898 (1965), cert. denied 384 U.S. 1011 (1966), rehearing denied 385 U.S. 835 (1966). To hold otherwise would violate the clear language of the Miranda court at page 477:

" ° ° ° Our decision is not intended to hamper the traditional function of police officers in investigating crime ° ° ° seek(ing) out evidence in the field ° ° °. Such investigations may include inquiry of persons not under restraint ° ° ° . In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present ° ° °."

NO DECEIT

The defendant in the instant case, having completed an eighth grade education, was engaged in several businesses

and had retained the services of a qualified, able and reputable accountant with whom the Government agents dealt at the direction and request of the defendant. The defendant may safely be designated an "ordinary taxpayer." Therefore, the following language used by the Court in United States v. Sclafani [59-1 USTC ¶9357], 265 F.2d 408, 414, 415 (1959) becomes particularly pertinent:

> "A 'routine' tax investigation openly commenced as such is devoid of stealth or deceit because the ordinary taxpayer surely knows that there is inherent in it a warning that the government's agents will pursue evidence of misreporting without regard to the shadowy line between avoidance and evasions, mistake and willful omission.
>
> "Moreover, it is unrealistic to suggest that the government could or should keep a taxpayer advised as to the direction in which its necessarily fluctuating investigation leads. The burden on the government would be impossible to discharge in fact, and would serve no useful purpose."

In United States v. Prudden [70-1 USTC ¶9336], 424 F.2d (1970), the Court said at page 1033:

> " • • • We conclude that mere failure of a Revenue Agent (be he regular or special) to warn the taxpayer that the investigation may result in criminal charges, absent any acts by the agent which materially misrepresent the nature of the inquiry, do not constitute fraud, deceit and trickery • • •." (Emphasis ours.)

There is no evidence that the nature of the inquiry was misrepresented and no evidence of fraud, trickery or deceit. Absent such acts no obligation was imposed upon

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the agents to warn the defendant of the possible outcome of the investigation. In Spahr v. United States [69-1 USTC ¶9315], 409 F.2d 1303, the Court said as follows at page 1306:

> "• • • If the agents procured their invitation through guile or fraud, the • • • examination would constitute an unreasonable search • • •. We find no deception. Agent Byerly identified himself as a special agent from the Intelligence Division • • •."

Likewise, see United States v. Frank [57-1 USTC ¶9675], 245 F.2d 284 (1957) and Wheeler v. United States [58-2 USTC ¶9626], 256 F.2d 745,[6] where at page 746 the Court stated:

> "The investigation thus concluded with exactly what is a foreseeable result of any income tax return audit, should the audit develop evidence of fraud."

Also see the more recent case of United States v. Jaskiewicz, supra.

Guile, trickery, fraud and deceit are simply not in this case. They exist where an agent either affirmatively misleads the taxpayer or his agent, or where he misrepresents something or fails to disclose something which he has a duty to disclose. The extent of the investigation need not be disclosed. United States v. Jaskiewicz, supra. Here, the Government agents, at defendant's request, dealt with the defendant's accountant, who acted as defendant's attorney in fact. The defendant knew, as did his accountant, that if an audit of records disclosed evidence of fraud the Government would act accordingly. This is a "foreseeable result of any income tax return audit." Wheeler v. United

[6] Both cases from the Third Circuit.

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States, supra. The defendant, seeking to establish guile, fraud, deceit and trickery, points, for example, to the agents' request that the accountant submit to the defendant, for his approval and signature, the net worth statement (G-243). This was not trickery or deceit. Had such statement not been submitted to the defendant and had the Government proceeded without determining whether the defendant was satisfied with or approved its contents, the defendant might more logically allege fraud or deceit. It is evident that the Government took the only course which was fair to the defendant and to those representing him.

Additionally, the defendant contends that he was misled or deceived because on a prior occasion (a prior year) a civil settlement was made by the Government after audit and that the defendant, therefore, had no reason to suspect that a criminal prosecution would follow the audit here involved. The defendant's experience or lack of experience with prior prosecutions cannot be either the basis for a charge of fraud and deceit, or the basis for the Miranda warnings.

ACCOUNTANT'S BELIEF

Neither is there any basis for the defendant's contention that the accountant should have received the Miranda warnings or that he was "deceived and misled into believing that the matter could be resolved on a civil basis and that the Government did nothing to dispel that belief."[7] The accountant's state of mind can hardly be the basis for an allegation of fraud and deceit. In like circumstances, any accountant, and his client, would hope that the matter could be and subsequently would be resolved on a civil basis. Indeed, the Government might well hope

[7] See page 27 of defendant's brief.

for the same result. That the results were otherwise cannot be the basis for a broadside charge of fraud, deceit, trickery and misrepresentation. We find these and similar contentions advanced by the defendant to be without merit. Fraud, deceit, trickery and misrepresentation are not and never were in this case. Moreover, the Miranda warnings, as already stated, are not required in the absence of a custodial interrogation or absent "any form of restraint upon his freedom of action." See the case of United States v. Jackiewicz [70-2 USTC ¶9616], 433 F.2d 415, 420 (3rd Cir. 1970) which was likewise an income tax evasion case, and where the defendant advanced contents similar, if not identical, with the contentions here advanced. There, as here, information was obtained from the defendant's accountant. There, as here, the Government followed routine investigative procedures, involving the usual audit of the defendant's records followed by a reference to a Special Agent of the Intelligence Division when fraud was suspected or discovered. There, as here, the defendant contended he was entitled to the Miranda warnings. The Court squarely rejected the defendant's contentions and affirmed the conviction. Therefore, the defendant's contentions are without merit.

NET WORTH METHOD

III. The defendant contends that it was error to have allowed the Government to introduce evidence as to pre-prosecution year's income and expenditures by the taxpayer. Consideration of this and other issues requires a careful study of Holland v. United States [54-2 USTC ¶9714], 348 U.S. 121. That and subsequent cases dealing with the net worth method of proof have prescribed certain principles designed to protect the defendant taxpayer and to assure that the innocent will not be improperly convicted on the basis of circumstantial evidence. Among others they are:

(a) the establishment with reasonable certainty of an opening net worth to serve as a starting point from which to calculate future increases in the taxpayer's assets;

(b) the Government's investigation of leads furnished by the taxpayer as to the possible source of his assets; the negation of reasonable explanation by the taxpayer inconsistent with guilt. When the Government fails to show an investigation into the validity of such leads they may be considered as true and the Government's case held insufficient. This aids in forestalling unjust prosecutions and relieves the defendant of the dilemma of having to come forward with such proofs at the risk of an adverse verdict. This is consistent with the Government's duty to see that justice is done at the possible expense of a conviction;

(c) the production of evidence to support the inference that the defendant's net worth increases are attributable to currently taxable income. Increases in net worth, standing alone, cannot be assumed to be attributable to currently taxable income. But, proof of a likely source, from which the jury could reasonably find that the net worth increases sprang, is sufficient;

(d) the burden of proof remains upon the Government. The practical disadvantages to the taxpayer are lessened by the pressures on the Government to check and negate relevant leads. Likewise see Friedberg v. United States [54-2 USTC ¶9713], 348 U.S. 142 (1954).

PRIOR YEARS

The Government sought to comply with the dictates of Holland, as it was obliged to do, by the introduction of evidence as to pre-prosecution years taxpayer income and expenditures. After vigorously contending that the net worth statement and cash flow statements were legally

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inadmissible, inaccurate and incompetent, (subdivision II, supra) the defendant now contends that they sufficiently established an opening net worth and starting point from which to calculate future increases in taxpayer's net worth and that evidence of pre-prosecution years' income and expenditures was improper. The inconsistency in the defendant's arguments demonstrates the burden resting upon the Government which it could meet only by the production of the evidence here attacked.

Further answer to the defendant's contention rests in the fact that by proving pre-prosecution years' expenditures and income, the Government thus fortified its contention that the defendant's financial resources prior to the prosecution years were such that he could not have amassed a greater store of wealth than that credited to him in the net worth statement. This bolstered the truthfulness of and thus corroborated the post-offense admissions contained in G-243 and thereby established a reasonably firm "starting point" as required by law. Consequently, the Government not only had the right, but, indeed, the duty to offer and introduce evidence relating to pre-prosecution years' income and expenditures which the Government proved for the years 1952 through 1960, all prior to the indictment period (G-325 and 326). A computation of these (G-327) showed an unaccounted-for sum which, obviously, the jury believed was spent during those prior years by the defendant for his and his family's personal living expenses. Such non-deductible expenditures are generally not capable of direct proof.

It is not necessary that corroboration evidence, in and of itself, prove the alleged crime beyond a reasonable doubt or by a preponderance of the evidence. It is necessary only that it bolster the truthfulness of the admissions themselves and thereby, together with the admissions, prove the alleged offense beyond a reasonable doubt.

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Smith v. United States [54-2 USTC ¶9715], 348 U.S. 147 (1954).

Additional answer to defendant's contention presently under consideration is found in counsel's opening remarks to the jury which immediately followed those of the Government. He spoke of income "in the years prior to 1961." He spoke of money "accumulated * * * prior to 1961." He spoke of pre-1961 "savings." He spoke of "moneys for the previous years" expended during the taxable years in question. He spoke of money "accumulated" that is "non-taxable." He spoke of money or savings "put away under your mattress, under your rug, in your safe deposit box, wherever you had it." He spoke of "borrowed money" and he said, "Now, we will show moneys borrowed, we will show moneys accumulated, and we will show these were the moneys that were spent." [8] That he didn't do it is of no consequence. That he said it constituted the lead or leads which the Government followed and which, for this and other reasons, resulted in the introduction of the evidence of which the defendant now bitterly complains.

For the purposes of the present argument and inconsistent with the record, the defendant, through his counsel, now states: "It is also extremely vital to note that the defense never contended that it had any cash hoard on hand. On the contrary, the defense, in general, agreed that the starting point for the cash on hand as of January 1, 1961, was exactly what appears on the face of the Government exhibit." [9] We knew and now know of no such "general agreement." Moreover, it is regrettable that the defendant's position at the inception of the trial was so poorly stated. It is doubtful, but barely possible that

[8] See pages 20 and 21 of the record.

[9] See page 32 of the defendant's brief.

weeks of testimony might have been eliminated. Whatever the cost, in time and otherwise, the fact remains that the procedures outlined in Holland were properly followed, " • • • a procedure entirely consistent with the position long espoused by the Government, that its duty is not to convict but to see that justice is done." (P.136) In the light of the "leads" contained in the opening remarks of counsel, "which, if true, would establish the taxpayer's innocence," the Government could not risk the admonition contained in Holland that, absent an investigation of such leads by the Government, "the trial judge may consider them as true and the Government's case insufficient to go to the jury." (P. 136) Here, as there, "The Government's detailed investigation was a complete answer • • •." (P. 136) Taxpayer's income and expenditure for pre-prosecution years were properly admitted.

DOCUMENT

IV. The defendant contends that the Court erred in admitting into evidence G-304, a document which showed the payment, in a pre-prosecution year, of a fine in the amount of $569.25 and the forfeiture of the sum of $1,940.50. Contrary to the record, he once again argues that pre-prosecution year expenditures were improperly admitted since "there was no allegation by the defense of a 'cash hoard' at the starting point of the year in question." [10] Our previous discussion of pre-prosecution expenditures clearly establishes that compliance with the decision in Holland and other cases permitted of no other course.

The defendant further contends that G-304 was inadmissible because it represented evidence of a criminal offense. But, it was not the only evidence of record pertaining to

[10] See page 36 of defendant's brief.

defendant's gambling activities. Therefore, its probative value for the purpose admitted, clearly outweighed any prejudicial effect. The evidence must be viewed in qualitative rather than quantitative terms. Moreover, it was not admitted for the purpose of proving a crime. It was admitted to show an expenditure. That it incidentally showed a prior offense, involving gambling activities of which there was other evidence is of no moment. In United States v. Stirone, 262 F.2d 571 (1958), the Court stated:

> " • • • Evidence of other offenses may be received if relevant for any purpose other than to show a mere propensity or disposition on the part of the defendant to commit the crime."

G-304 represents an expenditure of approximately $2,-500.00 in the year in question. It was only part of a vast amount of evidence offered by the Government to counter the defendant's references to prior accumulations, savings, loans, etc., whether under the "mattress," under the "rug," in the "safe deposit box" or otherwise. The language used by the Third Circuit in the case of United States v. Caserta [52-2 USTC ¶9540], 199 F.2d 905 (1952), at 909, is particularly applicable:

> " • • • Another complaint of the defendant is that the government introduced evidence of other offenses. This testimony was to the effect that the defendant had paid fines for the violation of state laws on two occasions. The defendant now says that this was erroneous and cites the well-known rule to the effect that a man is not to be convicted of one crime by evidence showing that he has been convicted of another. That was not the reason for the use of the testimony in this case. The prosecution was en-

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deavoring to show what the defendant spent his money for. It might have been theater tickets, it might have been automobiles (as it was), or a boat (as it was) or paying it out to the Commonwealth of Pennsylvania in fines. If part of defendant's income was spent for this purpose the Government may show it as part of the picture of defendant's expenditures which it was required to make. There is nothing to the defendant's point."

Contrary to defendant's contention, G-304 was not inflammatory. It was not inflammatory standing alone and certainly not inflammatory in the light of the entire record. It sufficiently identified the defendant by name and place of business. It was properly admitted. To have allowed the Government to thereafter produce, as attempted, a police officer to point his finger at the defendant and again identify him in open court was unnecessary, may have been inflammatory and would, we believe, have been prejudicial. Therefore, we sustained the defendant's objection to the testimony of such police officer. He now complains that we did so. The defendant's connection with the expenditure represented by G-304 was adequately established on the face of the exhibit. The jury could accept it or disregard it. The defendant properly objected to the proposed testimony of the arresting police officer and we believe the Court properly sustained the defendant's objection. Had we not done so the defendant would continue to allege error.

EXHIBIT

V. The defendant contends that the Court erred in admitting into evidence G-90. Said exhibit recites as follows:

"December 6, 1962

"This is to duly swear that I, John Parenti, of 736 South 25th Street, Allentown, gave to Fred Mathern in the year of 1961 various sums of money totaling Six Thousand Nine Hundred Dollars ($6,900.00).

"/s/ John C. Parenti

"Sworn to and subscribed
before me this 7th day of
December, 1962
/s/ Charles Ward
Bethlehem, Pa.
My Commission expires 11/18/63."

The defendant's signature was established by a duly qualified handwriting expert. (Notes of testimony, page 1850 et seq.) The defendant offered no evidence to the contrary. G-90 was properly admitted. Whether it was a gift, a loan or some other type of transaction which can be conjured up by one's imagination was for the jury. The document, duly signed by the defendant, speaks for itself. It was for the jury to interpret it. The Government was under no obligation and indeed had no right to offer interpretative evidence after establishing that the defendant signed the document. Thus, the defendant's contention is without merit.

IRS AGENT'S TESTIMONY

VI. The defendant alleges that the Court erred in admitting the testimony of Agent Singer, of the Internal Revenue Service, as to conversations with and admissions by one O'Malley, the defendant's accountant and attorney-in-fact. There is no dispute that O'Malley was the individual to whom Government agents were directed and referred by the defendant. O'Malley was the defendant's representative and agent acting within the scope of his authority. O'Malley so testified. (Pre-trial transcript #1,

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June 16, page 45). The defendant so testified. (Pre-trial transcript #1, June 16, pages 4, 11 and 15). O'Malley operated pursuant to powers of attorney duly signed (G. 247-50). O'Malley prepared and, as preparer, signed the defendant's income tax returns. The statements or admissions by O'Malley, as the agent representative and attorney-in-fact were clearly admissible under the doctrine of Vicarious Admissions. See Rule 63(9)(a) of the Uniform Rules of Evidence; KLM v. Tuller, 292 F.2d 775 (1961); Slifka v. Johnson, [47-1 USTC ¶10,548], 161 F.2d 467 (1947); United States v. Massei [57-1 USTC ¶9434], 214 F.2d 895, 902 (1957); United States v. Dolleris [69-1 USTC ¶9289], 408 F.2d 918 (1969); cert. denied 395 U.S. 943 (1969); Epstein v. United States [57-2 USTC ¶9797], 246 F.2d 563, 570, 571 (1957). The doctrine is not new. It is not of recent origin. In Cliquot's Champagne, 70 U.S. 114, the Court stated as follows:

> "Whatever is done by an agent, in reference to the business in which he is at the time employed, and within the scope of his authority, is said or done by the principal and may be proved in a criminal as in a civil case in all respects, as if the principal were actor or the speaker * * *."

It is currently approved (see the preliminary draft of proposed Rules of Evidence for the United States District Courts—Committee's Report, March 1969, at pages 160 and 169). The doctrine of vicarious admissions is alive and well. It was clearly applicable in this case. The defendant has cited no cases to the contrary. The testimony in question was admissible. Its weight was for the jury.

For the reasons already stated, the defendant's continued contention that O'Malley was entitled to the Miranda warnings is rejected.

VII. For the reasons already stated, G-231, a "Q&A" statement given by O'Malley, was properly admitted. For the first time the defendant now contends that it contained inflammatory material in that O'Malley referred to the defendant as a good family man and churchman and suggested that he was not a racketeer or gangster. Aside from the fact that the objection comes too late, the fact is that O'Malley sought to attest to the defendant's virtues and read in its entirety G-231 is not inflammatory.

BOOKIE'S TESTIMONY

VIII. The Holland case, supra, imposes upon the Government as we have already stated, the burden, duty and obligation to show a "likely source" from which the jury could reasonably find that the alleged net worth increases sprang. Seeking to meet this obligation and burden, the Government called one Ludwig Iskra, who testified, inter alia, that he "took bets" for the defendant. (Notes of testimony, page 1587). The defendant contends that such testimony may have been perjured, that it was equivocal, vacillating, unworthy of belief, emotional and obtained under pressure by Government agents. The credibility and weight of his testimony was for the jury. There is no doubt as to its admissibility. Holland v. United States, supra; United States v. Johnson [43-1 USTC ¶9470], 319 U.S. 503, 515, 517 (1943); United States v. Costello [55-1 USTC ¶9342], 221 F.2d 668 (1955).

GOVERNMENT CHARTS

IX. The defendant contends that he was prejudiced by the admission of Government charts (G-324-338). The use of charts, not as evidence, but as an aid to the jury, has been approved. United States v. Johnson [43-1 USTC ¶9470], 319 U.S. 503, 519 (1943); Gariepy v. United States [51-1 USTC ¶9318], 189 F.2d 459, 462 (1951). In Smith

v. United States [57-1 USTC ¶9242], 239 F.2d 168 (1956), the Court said as follows:

> " • • • The admission of such tabulations as an aid to the jury does not constitute reversible error. It has been approved by this court in recent cases of income tax evasion. In Gariepy v. United States, 6 Cir. [51-1 USTC ¶9318], 189 F.2d 459, 462, the court declared that the computation was at best 'but an estimate, but as an estimate it was entitled to the consideration of the jury because based on substantially the entire evidence in the record.' Cf. Eggleton v. United States of America, 6 Cir. [56-1 USTC ¶9108], 227 F.2d 493; American Vitrified Products Co. v. Wyer, 6 Cir. 221 2d 447. The use of such calculations was approved by the Supreme Court in United States v. Johnson [43-1 USTC ¶9470], 319 U.S. 503, 519, 63 S. Ct. 1233, 1241, 87 L.Ed. 1546. The record shows that within the holding of the Johnson case the trial court herein left the jury 'free to exercise its untrammeled judgment upon the worth and weight' of the evidence given in these charts."

Such practice has been approved particularly in income tax evasion cases which are long, cumbersome and sometimes involve complex and complicated figures and calculations. This was such a case. It involved over 3,400 pages of testimony, over 326 exhibits, over 120 witnesses who testified over a three-month period, eleven years of financial history and transactions, multiple checking accounts, multiple savings accounts, four separate businesses, at least six pieces of real estate, stock in several corporations, loans, automobiles and furniture. To have denied the use of charts would obviously have been an error. Both the prosecution and the defense were allowed the use of charts, subject to appropriate jury instructions, and each

was given ample time to study the charts of the other and become acquainted with the details thereof. We conclude that the use of charts by both sides was proper.

CONTENT OF CHARTS

X. The defendant objects to the content of the Government charts (G-324-338). The charts were the subject of considerable testimony explaining in detail to the jury the source of the information, the basis for the various items therein contained, the method of calculation followed, etc. They did not and they need not in each instance give effect to the contentions of the defendant. In Flemister v. United States [58-2 USTC ¶9904], 260 F.2d 513 (1958), the Court said "A summary, to be admissible, we think need not give effect to the contentions of the accused." This was left to summaries offered by the defendant. The Government's charts were what they purported to be as explained in detail by Government witnesses. They were not subject to the infirmities discussed in United States v. Altruda [55-2 USTC ¶9592], 224 F.2d 935 (1955). The jury was carefully charged as to the function and use of the charts (P. 4153). We do not believe the use of the charts invaded the jury function and we do not believe the charts are or were objectionable because they did not embody all the evidence which the defendant would have included in the manner and form in which he would have treated it. The defendant was given the opportunity to submit his own charts. See Meyers v. United States, 356 F.2d 469 (1966) where the Court stated at page 470:

"Although the summary does not include all the evidence, or appellant's theories of the evidence, it does not purport to. See Flemister v. United States, 5 Cir., 1958, 260 F.2d 513. It does not contain anything not in the record, United States v. Ward, 3 Cir., 1948, 169

F.2d 460, and identifies in detail the evidence summarized, Lloyd v. United States, 5 Cir., 1955, 266 F.2d 9. Finally, in view of its contents and the Judge's instructions regarding its use, this summary did not usurp the province of the jury. Steele v. United States, 5 Cir., 1955, 222 F.2d 628."

Likewise, see United States v. Smith [56-2 USTC ¶9830], 236 F.2d 260 (1956).

NET WORTH METHOD

XI. Increases in net worth may result either from an increase in assets or a decrease in liabilities. Through the testimony of the defendant's accountant and others, the Government established that the defendant's liabilities decreased in 1961, 1962 and 1963 in the manner following and in the amounts stated:

1. An alleged mortgage payable to the defendant's father in the amount of $10,000.00.

2. An alleged loan payable to Norman Meyers in the amount of $19,700.00.

3. An alleged loan payable to the defendant's father in the amount of $10,000.00.

The defendant argues that the Government failed to establish that the funds with which these liabilities were liquidated specifically came from taxable income. In a prosecution of this kind such precise and specific burden does not rest upon the Government. Holland prescribes that the Government shall establish a " • • • likely source, from which the jury could reasonably find that the net worth increases sprang • • •." (Pages 137 and 138) As the Holland court said (p. 137) " • • • Increases in net worth, standing alone, cannot be assumed to be attributable to currently taxable income." But here the in-

crease in net worth resulting from a decrease in liabilities does not stand alone. The Government has shown a "likely source" from which may have come the money to reduce liabilities and from that the jury may or may not find that the increase was from currently taxable income, from a cash hoard or from under the rug, the mattress or the safe deposit box as defendant's counsel suggested in his opening remarks. It is a question for the jury and when the defendant now argues that there is no basis for the inference that taxable income was used in reducing said liabilities, he quarrels with the very substance of the net worth method and invades the function of the jury. His quarrel is with the jury, its inferences and its findings, not with the Government, the evidence or the rulings of the Court. His argument is without merit.

CORROBORATION

XII. Pointing again to the three items discussed in the preceding subdivision (XI), plus G-90, (see subdivision V, supra) the defendant contends that they represent post-offense admissions which have not been corroborated as required by law. Smith v. United States [54-2 USTC ¶9715], 348 U.S. 147 (1954). He looks for specific corroboration of each specific item and overlooks the fact that in income tax evasion cases corroboration may be found, as here, in greatly increased visible assets at a time when the taxpayer is receiving unrecorded income. United States v. Calderone [54-2 USTC ¶9712], 348 U.S. 160 (1954):

> " • • • an inference of tax evasion could be based on the fact that the taxpayer's visible assets greatly increased at a time when he was receiving unrecorded income • • •."

In United States v. Opper, 348 U.S. 84, 93 (1954) the Court said:

"• • • we think the better rule to be that corroborative evidence need not be sufficient, independent of statements, to establish the corpus delicti • • •."

Passing over the fact that G-90 was obtained in connection with an unrelated proceeding and may not need corroboration (Smith v. United States, supra) the fact remains that as to this and the other three items specified by the defendant, corroboration rests in the proof by the Government that defendant (a) received unrecorded amounts of taxable income,[11] and (b) realized a substantial increase in visible assets.[12] The language used by the Supreme Court in Calderone, supra, becomes pertinent (p. 166):

"The increments, when considered in the light of the respondent's receipt of unrecorded amounts of taxable income, are sufficiently at variance with his reported income to support an inference of tax evasion."

At page 167, the Court said:

"We hold that the financial history of respondent and his business during the prosecution years provides sufficient independent evidence of the crime of tax evasion to corroborate his statements • • •."

And at page 169:

"• • • although the evidence was insufficient to corroborate the opening net worth directly we find the

[11] Numbers operations testified to by witness Iskra, and crap game testified to by witness Skelly.

[12] Based on the record, the Government calculates such increase as follows at page 49 of its brief:

"• • • During the prosecution years 1961-1963, Parenti's assets increased from $94,956 to $210,987, or $116,031. During this same period he made personal, non-deductible expenditures of $104,029. In short, his assets increased by $116,031, and he had personal expenses of $104,029, a total of $220,029. In 1961, 1962 and 1963 he reported taxable income of $109,726, a difference of $111,028."

independent proof of tax evasions adequate." (Emphasis ours.)

Therefore, post-offense admissions were properly and sufficiently corroborated and a directed verdict or judgment of acquittal was not and is not justified on this record.[13]

XIII. Reiterating lack of corroboration and restating alleged defects in G-243 (the net worth statement) the defendant contends, for the same reasons previously treated at length, that the Government failed, therefore, to establish a reasonably firm starting point upon which to base net worth computations. No purpose would be served by repeating what we have heretofore stated. We are convinced the contention is without merit.

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[13] Additional corroboration, not essential to the disposition of the defendant's motion, may be found in the record as a whole and, although arguable, is worthy of consideration.

First, apparently nothing was paid to defendant on account of the sale of Market Motors in 1962. This suggests that the parties were treating the transfer as a satisfaction of a liability of defendant to Meyers.

Second, during the course of the prosecution years, the Government established, independent of the defendant's admissions, that his records of his gambling activities were poorly maintained and incomplete and that during the course of the prosecution years the defendant's assets were increasing well in excess of that which could be attributed to his reported income for the same period. These two factors alone tend to establish the crime of income tax evasion independent of the net worth method. *United States v. Calderone* [54-2 USTC ¶ 9712], 348 U.S. 160 (1954).

Third, even assuming the liabilities in question are disregarded, there remains a substantial deficiency for the *three* prosecution years which constitutes corroboration. *United States v. Calderone, supra.* But the defendant maintains that if we disregard the payment of the alleged liability to Norman Meyers, the deficiency for the calendar year 1962 would be wiped out and the defendant could not be convicted for that year. However, the court in *United States v. Calderone, supra,* indicated quite clearly that if the record shows an *overall* deficiency for the prosecution years, even though the deficiency for one of those years would be wiped out if the post-offense admissions are disregarded, there is sufficient corroboration to support a conviction for *all* of the prosecution years.

FURTHER CONTENTIONS

XIV. Once again, the defendant urges a judgment of acquittal. He quarrels with the theory of the net worth method, its application and its results. Said method has been approved by the Supreme Court and he cannot here set it aside.

Again ignoring substantial portions of the record, he argues: [14]

"A reading of a vast majority of net worth cases reveals that they have a common factual thread running through all of them. A vast majority of cases contain either one or a combination of the following facts:

1. The government can establish large expenditures of cash on the part of the defendant.

2. The government establishes the failure of the defendant to keep proper and adequate books and records.

3. The government is able to establish a likely source for the alleged untaxed income.

4. The defense almost invariably raised in these type cases is based upon alleged existence of a substantial cash hoard on hand at the starting point.

"It should be noted that none of the above factors existed in the present case • • •."

He thus asks the Court to invade the fact-finding field and usurp the functions of the jury. The fact is

1. that the Government did establish substantial expenditures of cash;

2. that "books and records" were not kept or at least poorly kept as to income from gambling activities;

[14] See pages 111 and 112 of defendant's brief.

3. that the Government did establish likely source or sources of unreported income; and

4. a substantial cash hoard was alleged at the very inception of the case, although never established.[15] In any event, the burden rests upon the Government to establish a "likely source" (United States v. Holland, supra) or negate non-taxable sources of income (United States v. Massei [58-1 USTC ¶9326], 335 U.S. 595 (1958). In this case, it did both. The defendant's motion is without merit.

XV. Reverting again to the net worth statement (G-243) the defendant again insists that it was procured by fraud, trickery and deceit. We have already discussed this issue at length (II, supra) and we shall not here repeat our prior observations except to again state that trickery, fraud, deceit, guile and misrepresentation were not and are not in this case except for the purpose of this motion.[16] The defendant now suggests a special interrogatory to the jury on the question of trickery, fraud or deceit in the procurement of G-243 and other statements. The simple answer is that the issue was not involved. Unlike Smith v. United States [54-2 USTC ¶9715], 348 U.S. 147 (1954), no promises were made by Government agents "to close the case" (p. 150); no representations were made that the investigation related to civil liability only and no suggestions were made or impressions left that the Government would do any less than follow its usual practices and procedures. A specific jury instruction as to fraud, trickery or deceit was no more warranted on this record than an instruction relating to forgery which admittedly was not in the case. The Court owes some duty to the jury not to confuse it with instructions which are neither relevant nor

[15] The Government may have eliminated a "cash hoard" by its proofs as to funds received and applied from 1952 through 1960.

[16] The Government has labeled it a "gratuitous red herring." (See page 54 of the Government's brief.)

related to the evidence in the case and the issues raised thereby.

Further answer rests in the fact that the jury was specifically instructed to consider "all of the circumstances surrounding the procurement of those (the) admissions" in question (page 4151). It was instructed that "an act, or failure to act is knowingly done • • • if it is done voluntarily • • • and not because of mistake, accident or other reason (page 4157)." The defendant's contention is without merit.

COURT'S CHARGE

XVI. In this instance, the defendant levels a broadside at the charge of the Court. We charged at length as to the presumption of innocence (page 4146 et seq.). We charged in detail as to the burden resting upon the Government (p. 4147 et seq.). We charged carefully as to "reasonable doubt" (p. 4147) and we charged that if the evidence "reasonably permitted either of two conclusions, one of innocence and the other of guilt, the jury should, • • • adopt the conclusion of innocence." (P. 4148) We charged as to "reasonable inferences" to be drawn from the evidence (p. 4149) and we sought to properly charge as to "net worth" (pages 4164 and 4165). Where the points or requests properly stated the law, we so charged although not necessarily always in the precise verbiage requested. Where the point or request incorrectly stated the law or where it was too broadly stated, we denied. We think the charge was adequate.

XVII. The defendant here reasserts all objections and motions made at time of trial and on the basis thereof presses his motion for a judgment of acquittal or in the alternative for a new trial. Having again considered the record, as requested by the defendant, we are irresistibly drawn to the conclusion that his motion is without merit.

Addendum "B"

Opinion of the United States Court of Appeals for the Third Circuit

Argued October 31, 1972

Before Kalodner, Adams and Rosenn, Circuit Judges.

PER CURIAM:

This appeal is from a judgment of conviction entered by the District Court pursuant to a jury verdict finding the defendant-appellant John C. Parenti guilty of attempting to evade and defeat payments of his 1961, 1962 and 1963 income taxes in violation of 26 U.S.C.A. §7201.

On this appeal Parenti challenges as prejudicial error ten of the trial judge's rulings on the admission of evidence and two of his instructions to the jury. He also challenges as unconstitutional the Government's use of the "net worth" method of proof. Finally, he contends that the Government's evidence was insufficient to sustain the jury's verdict and that the trial judge erred in denying his motion for a directed verdict.

On review of the record we are of the opinion that Parenti's challenges to the trial judge's rulings on the admission of evidence and his instructions to the jury fail to demonstrate prejudicial error. Holland v. United States, 348 U.S. 121 (1954), is dispositive of Parenti's challenge to the "net worth" method of proof. We are further of the opinion that the evidence was sufficient to support the jury's verdict.

Judicial economy would not be served by a detailed discussion of Parenti's challenges to the sufficiency of the evidence and to the trial judge's rulings on the admissibility of evidence and his instructions to the jury, in light of

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the exhaustive consideration they were accorded in Judge Troutman's well-reasoned Opinion [1] denying Parenti's motion for a judgment of acquittal or, in the alternative, a new trial.

For the reasons stated the judgment of conviction will be affirmed.

TO THE CLERK OF THE COURT:

Please file the foregoing opinion.

United States Circuit Judge

[1] Judge Troutman's Opinion is reported at 326 F. Supp. 717 (E.D. Pa. 1971).

Addendum "C"

Judgment of the United States Court of Appeals for the Third Circuit

Present: Kalodner, Adams and Rosenn, Circuit Judges

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed February 9, 1972, be, and the same is hereby affirmed.

ATTEST:

/s/
Clerk

December 26, 1972

Addendum "D"

Statement of Issues

I. The court erred in admitting into evidence any and all testimony concerning alleged expenditures of the defendant which occurred prior to the prosecution years involved.

II. It was prejudicial error for the court to allow into evidence testimony concerning an arrest of the defendant which occurred in a pre-prosecution year.

III. The court erred in allowing into evidence government exhibit G-90 and all testimony concerning the contents of this statement.

IV. The court erred in admitting into evidence any and all testimony of government agent Singer in respect to alleged conversations that he had with are defendant's accountant, O'Malley.

V. The court erred in admitting into evidence a statement given by the defendant's accountant, O'Malley, to the Internal Revenue Service.

VI. The learned trial judge erred in not excluding from the evidence the testimony of government witness, Ludwig Iskra.

VII. The learned trial court erred in admitting into evidence government Exhibit Nos. 324 through 338, inclusive. This objection has reference to all of the government's summary charts.

VIII. The learned trial judge erred in admitting into evidence all of the government's summary charts mentioned above for the reason that these charts were not a summary of the evidence, but were, in fact, prejudicial, biased and selective self-serving documents prepared by the government.

IX. The learned trial court erred in allowing the government summary charts and government expert witnesses to testify to the jury that the elimination of certain alleged liabilities of the defendant from the net worth statement taken from him created income.

X. The learned trial court erred in failing to grant a directed verdict of acquittal based upon the fact that the government failed to establish the corpus delicti of the crime charged with evidence other than with alleged admissions by the defendant.

XI. The court erred in not granting defendant's motion for directed verdict of acquittal based upon the failure of the government to prove by competent evidence that the defendant had taxable income in excess of that which he had reported.

XII. The court erred in allowing into evidence all documents and exhibits and testimony which it obtained from the defendant and/or his agents prior to January of 1968.

XIII. The lower court erred in not submitting as a factual question to the jury whether or not certain government exhibits, particularly government Exhibit G-243 was obtained from the defendant as a result of fraud, trickery or deceit.

XIV. The lower court's charge was inadequate in that it failed to properly and adequately inform the jury as to the proper application of the net worth theory and as to the inferences that flow therefrom with respect to the facts arising from the evidence in this case.

XV. The inferences which the jury is allowed to draw from an alleged increase in a defendant's net worth are unconstitutional since there is no rational connection between the fact allegedly proven and the ultimate fact presumed therefrom.

Addendum "E"

Statement of Net Worth of John C. Parenti

FOR THE YEARS ENDED DEC. 31, 1960 — DEC. 31, 1961 — DEC. 31, 1962 — DEC. 31, 1963

ASSETS:	DEC. 31, 1960	DEC. 31, 1961	DEC. 31, 1962	DEC. 31, 1963
Cash in Bank—Market Motors	$ 3,932.24	$ 275.31	$ 271.22	
Cash in Bank—Personal Ck. Acct.	1,268.98	1,802.78	715.70	
Cash in Bank—Savings Account	1,180.00	–0–	10,181.00	
Cash on Hand	4,149.23	6,343.83	5,374.63	
Total Cash on Hand & in Banks	$10,530.45	$ 8,421.92	$ 16,542.55	$ 5,362.28
Accounts Recble.—Mkt. Motors	10,353.50	7,448.40	–0–	–0–
Finance Reserves Receivable	3,907.66	2,833.89	–0–	–0–
Auto Inventories—Mkt. Motors	23,366.15	21,310.75	–0–	–0–
Tools & Parts	208.38	208.38	–0–	–0–
Prepaid Ins.—Mkt. Motors	797.04	854.29	–0–	–0–
Prepaid Federal Inc. Taxes	4,500.00	2,250.00	–0–	1,500.00
Cash Value Pers. Life Insurance	18,892.00	21,016.00	24,341.00	28,860.00
Personal Autos	–0–	2,000.00	5,500.00	8,500.00
Loans Receivable	–0–	–0–	15,250.00	23,850.00
Pers. Residence (Tilgman St.)	13,500.00	–0–	–0–	–0–
Pers. Residence (736 So. 25th)	–0–	35,000.00	35,000.00	35,000.00
Investment Ppty. (Lehigh St.)	6,200.00	6,200.00	6,200.00	–0–
Investment Ppty. (730 So. 25th)	–0–	–0–	20,000.00	20,000.00

Investment Ppty. (So. Mtn. Grove)	-0-	-0-	-0-	30,750.00
Securities	-0-	14,000.00	14,000.00	14,000.00
TOTAL ASSETS	$92,255.18	$121,543.63	$136,833.55	$167,822.28
LIABILITIES:				
Loans Payable	$28,500.00	$ 39,700.00	$ 30,000.00	$ 40,000.00
Payroll Taxes Payable	337.32	99.80	-0-	-0-
Mortgage Payable (Tilgman St.)	10,000.00	-0-	-0-	-0-
Mortgage Payable (736 So. 25th)	-0-	25,000.00	21,966.99	19,356.66
Mortgage Payable (So. Mtn. Grove)	-0-	-0-	-0-	18,271.64
TOTAL LIABILITIES	$38,837.32	$ 64,799.80	$ 51,966.99	$ 77,628.30
NET WORTH	53,417.86	56,743.83	84,866.56	90,193.98
TOTAL LIABILITIES & NET WORTH	$92,255.18	$121,543.63	$136,833.55	$167,822.28

NOTE: The above statement presents, to the best of my knowledge, an accurate record of my financial position for the periods noted.

/s/ John C. Parenti
JOHN C. PARENTI
736 So. 25th Street, Allentown, Penna.

SCHEDULE OF
PERSONAL AUTOMOBILES OWNED, LOANS RECEIVABLE, SECURITIES OWNED, LOANS AND MORTGAGES PAYABLE FOR THE YEARS ENDED DEC. 31, 1960 — DEC. 31, 1961 — DEC. 31, 1962 — DEC. 31, 1963

	DEC. 31, 1960	DEC. 31, 1961	DEC. 31, 1962	DEC. 31, 1963
Personal Autos: 1959 Cad.	$ –0–	$ 2,000.00	$ 2,000.00	$ –0–
1961 T-Bird	–0–	–0–	3,500.00	–0–
1963 Cad.	–0–	–0–	–0–	3,500.00
1962 T-Bird	–0–	–0–	–0–	2,000.00
1964 Chev.	–0–	–0–	–0–	3,000.00
TOTALS	$ –0–	$ 2,000.00	$ 5,500.00	$ 8,500.00
Loans Receivable—The Redwood	$ –0–	$ –0–	$ 8,000.00	$ 8,000.00
—Beth. Leas. Corp.	–0–	–0–	7,250.00	10,250.00
—Theo. Iannelli	–0–	–0–	–0–	2,100.00
—Peter Gargone	–0–	–0–	–0–	3,500.00
TOTALS	$ –0–	$ –0–	$15,250.00	$23,850.00

Securities—Redwood	$ –0–	$13,000.00	$13,000.00	$13,000.00
—Beth. Leasing Corp.	–0–	1,000.00	1,000.00	1,000.00
TOTALS	$ –0–	$14,000.00	$14,000.00	$14,000.00
Loans Payable—Norman Meyers	$18,500.00	$19,700.00	$ –0–	$ –0–
—Armando Parenti	10,000.00	10,000.00	10,000.00	–0–
—Michael Rishko	–0–	10,000.00	10,000.00	10,000.00
—Dr. Isaki	–0–	–0–	10,000.00	10,000.00
—Theo. Iannelli	–0–	–0–	–0–	20,000.00
TOTALS	$28,500.00	$39,700.00	$30,000.00	$40,000.00
Mortgages Payable:				
Armondi Parenti—Tilgman St.	$10,000.00	$ –0–	$ –0–	$ –0–
Merchant's Nat'l.—736 S. 25th	–0–	25,000.00	21,966.99	19,356.66
Merchant's Nat'l.—So. Mtn. Grove	–0–	–0–	–0–	18,271.64
TOTALS	$10,000.00	$25,000.00	$21,966.99	$37,628.30

NOTE: The above schedule is subject to the note contained in the report it accompanies and should be read in conjunction therewith.

/s/ John C. Parenti
JOHN C. PARENTI
736 So. 25th Street, Allentown, Penna.

Addendum "E"

COMPANY	POLICY NUMBER	AMOUNT	KIND OF POLICY	ISSUE or ANNIVER-SARY DATE	Age at Iss.	Disability Premium Waived
Metropolitan	0851651	2,000	36 Year Endowment	4-3-44	24	No
Fidelity Mutual	633 755	2,000	Income for use at 65	9-13-45	26	No
Mutual Benefit Life of N.J.	3,113,182	15,000	Endowment at age 60	3-24-49	29	No
Mutual Benefit Life of N.J.	3,115,537	5,000	Endowment at age60	4-13-49	29	No
Fidelity Mutual	706514	10,000	20 Year Endowment	5-3-50	30	No
Mutual Benefit Life of N.J.	3,242,980	8,000	Whole Life	5-28-52	32	No
Mutual Benefit Life of N.J.	3,244,769	5,000	Whole Life	6-6-52	32	No
Mutual Benefit Life of N.J.	3,285,253	5,000	Endowment at age 60	5-7-53	33	No
Philadelphia Life	285-340	25,000	10 Year Endowment	12-1-61	42	No
TOTALS		77,000				

Disability Monthly Income	DOUBLE INDEM.	GROSS YEARLY PREM.	Auto. Non-Forfeiture Prov.	CASH—AS OF ANNIVERSARY (Reverse) 1963	1962	1961	1960
No	No	64.40		806	756	706	
No	No	61.60		882	816	754	
No	No	738.60		9,608	8,811	8,033	
No	No	246.30		3,203	2,939	2,677	
No	No	558.80		5,850	5,325	4,816	
No	No	239.30		1,506	1,362	1,219	
No	No	125.20		941	851	762	
No	Yes	299.60		2,625	2,333	2,049	
No	No	2,864.00		3,439	1,148	Not Issued	
		5,158.80		28,860	24,341	21,016	

THE FIGURES IN THIS COLUMN ARE NOT DISCERNIBLE

Addendum "F"
Revenue Agents Audit Report

In re: Fred & Hilda Mathern
1389 Newport Avenue
Northampton, Pa.

Year ended 12/31/61
Exhibit "B"

Bank Deposit Method:				
DEPOSITS:				
Cement Nat'l. Bank (Business Checking)				$76,073.02
Cement Nat'l. Bank (Personal Checking)				8,628.22
First Nat'l. Bank–Allentown (Savings)				5,000.00
Lehigh Valley Trust–Allentown (Savings)				3,000.00
Total Deposits				$92,701.24
Less:				
Exchanges	$951.04			
Pa. Sales Tax	2,501.04			
Bank Loan	2,500.00			
				$ 5,952.08
NET DEPOSITS RESULTING FROM BUSINESS RECEIPTS				$86,749.16
Total Outlays per return		$58,992.60		
Other expenses (not shown per return)		4,073.95	$63,006.65	
Bank Bal. Beg Year:				
Cement Nat'l. Bank (Business Checking)		(205.65)		
Cement Nat'l. Bank (Personal Checking)		447.66		
Cement Nat'l. Bank (Savings)		1,774.01		
Total Beg. Bal.		2,016.02		
Deposits		92,701.24		
Total		$94,717.26		

PAGES BOUND VERTICALLY

Less: Ending Bal.				
Cement Nat'l. Bus.	1,744.64			
Cement Nat'l. Per.	20.10			
Cement Nat'l. Sav.	1,774.01			
1st Nat'l. Allen.	5,000.00			
Lehigh Val. Tru.	1,500.00	10,038.75		
Total		$84,678.51		
Less:				
Personal Checks	18,581.79			
Sales Tax	2,501.04			
Exchanges	951.04			
Grove Expenses	4,073.96	$26,107.82	$58,570.69	
			4,485.96	$ 4,485.96
Cash Expenditures				1,560.00
Estimated Cash Living Expense ($30.00 x 52)				$92,795.12
Gross Receipts as Determined				
Gross Receipts Available:				
1.) Schedule C	63,836.74			
2.) Schedule D	14,416.04			
3.) Rental	1,860.00			
4.) Dividends	56.00			$80,168.78
Unaccounted for receipts				$12,626.34

NOTE: The Taxpayer presented an affidavit from John C. Parenti, 726 S. 25th Street, Allentown, Pa., stating that Parenti loaned the taxpayer $6,900.00 in cash in the year 1961. Mr. Parenti is an alleged "Bookie." The Affidavit is not considered in the above computation.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1156

JOHN C. PARENTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court, denying petitioner's motion for acquittal or, in the alternative, for a new trial (Pet. App. 1-27) is reported at 326 F. Supp. 717. The opinion of the court of appeals (Pet. App. 28-29) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 30) was entered on December 26, 1972. On January 9 1973, Mr. Justice Brennan extended the time for filing the petition for a writ of certiorari to February 24, 1973, and the petition was filed on February 22, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court erred in denying petitioner's motion for inspection and disclosure of exculpatory material when the government represented that it had no such material.

2. Whether *Miranda* warnings were required at the beginning of non-custodial interrogations of petitioner and his accountant by Internal Revenue Service agents.

3. Whether a document signed by petitioner was properly admitted in evidence.

4. Whether statements made by petitioner's accountant in his behalf were admissible in evidence against petitioner.

5. Whether the trial court erred in permitting the use by the government of charts in order to summarize the evidence for the jury.

6. Whether the evidence in this "net worth" prosecution was sufficient to support petitioner's conviction.

7. Whether participation at trial by an attorney from the Internal Revenue Service deprived petitioner of a fair trial.

STATUTE INVOLVED

Section 7201 of the Internal Revenue Code of 1954, 26 U.S.C. 7201, provides:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not

more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on three counts of having willfully attempted to evade and defeat substantial parts of his individual income tax liability for the years 1961, 1962 and 1963, in violation of 26 U.S.C. 7201. He was sentenced to one year in prison and fined $18,000.

The government's case was tried on the net worth method. The evidence showed, in brief, that petitioner had willfully underreported his taxable income in the following amounts (Pet. 5):

1961	$27,904.87
1962	17,964.79
1963	16,773.83
Total	$62,643.49

ARGUMENT

1. Petitioner contends (Pet. 14-16) that the trial court erred in denying his motion for inspection and disclosure of alleged exculpatory material. However, petitioner did not suggest to the trial court what exculpatory material, if any, might be available in the government's files, and the government expressly represented that it had no such material (Pet. App. A2). In such circumstances, the trial court ruling was clearly proper. Petitioner now asserts the existence of two separate alleged exculpatory facts. First, he claims that a document pertaining to the criminal tax in-

vestigation of one Fred Mathern was exculpatory in that it showed that he had never, as contested by the government, loaned monies to Mathern. That document computed deposits and withdrawals from Mathern's bank accounts; it expressly stated that petitioner's affidavit that he made loans aggregating $6900 to Mathern was not considered in the computation. But this does not indicate that the loan was not in fact made or even that the monies were not deposited from time to time or otherwise expended by Mathern.[1] Second, petitioner claims that a jeopardy assessment, for unpaid wagering taxes for the years 1952 through 1960, made by the government after his conviction, somehow indicates that the government believed he had a large cash hoard prior to the prosecution years. We see no basis for any such inference. Wagering taxes are levied on gross wagers, without regard to net profits from wagering activities. See 26 U.S.C. 4401. Thus there is no indication from the jeopardy assessment that petitioner had in fact accumulated substantial cash. And petitioner was in any event credited with significant net worth (over $88,000) at the beginning of the prosecution period.

2. Petitioner contends (Pet. 16-18) that the failure by investigating agents to provide him and his accountant with *Miranda* warnings at the outset of non-custodial interrogations rendered petitioner's signed statements inadmissible. This contention was fully considered

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[1] Moreover, there is now pending before the district court a motion by petitioner for a new trial based in part on the Mathern document as newly discovered evidence. In these circumstances consideration of the issue by this Court in the first instance is unwarranted in any event.

and answered by the district court in an opinion on which we rely (Pet. App. A3-A8). *Miranda* only applies to custodial interrogations involving significant restraints on personal freedom. In addition, there was no coercion or trickery here.

3. Petitioner also argues (Pet. 18) that the district court erred in admitting into evidence an affidavit signed by him to show the truth of the facts stated in the affidavit (the transfer of about $6900 from petitioner to Mathern in 1961). It is well established that a defendant's out of court statements are admissible in evidence against him, and petitioner's signature was established by a duly qualified handwriting expert (Pet. App. A16).

4. Similarly, petitioner contends (Pet. 19) that certain statements made by his accountant on his behalf to investigating agents were inadmissible. This contention is answered in the opinion of the district court on which we rely (Pet. App. A16-A17). The accountant was acting on petitioner's behalf when he made the statements.

5. Petitioner claims (Pet. 19-20) that the trial court erred in permitting the government to use charts to summarize its evidence at the end of this three-month trial. Petitioner's objection appears to be only that the government's charts summarized the evidence that was most favorable to the prosecution. However, petitioner also used charts to summarize the evidence most favorable to the defense. This issue was fully discussed by the district court in an opinion on which we rely (Pet. App. A18-A21). Both sides, with proper instructions to the jury, were permitted to recapitulate their evidence to aid the jury's deliberation.

6. Petitioner further contends (Pet. 20-26) that the evidence in this case, which was based on the "net worth and expenditures" method of proof, was insufficient to support a conviction. He particularly contests the evidence with respect to his satisfaction of $39,700 in liabilities during the prosecution years. However, there was ample evidence concerning petitioner's payment of these debts: petitioner's accountant testified as to these items (Pet. App. A21), and they were included in a net worth summary prepared by the accountant on the basis of information furnished by petitioner (App. 584a-586a, 669a-672a, 715a-716a)[2] and obtained from the books and records of petitioner's sole proprietorship (App. 601a-603a, 710a, 716a, 756a, 775a, 864a, 889a). The court of appeals expressly affirmed (Pet. App. A28) the trial court's determination (Pet. App. A21-A24) that the evidence was sufficient to support the jury's verdict, and this factual question warrants no further review.

7. Finally, petitioner contends (Pet. 26-27) that the participation by an Internal Revenue Service attorney in his trial deprived him of a fair trial, on the theory that criminal tax prosecutions must be tried by the Department of Justice. This case was, however, tried by Department of Justice attorneys; the Internal Reveenue attorney played no active role in the trial of the case but merely served in an essentially consultative capacity with respect to the complicated net-worth determinations necessary to the case. We do not see how such inter-agency assistance can be said to have deprived petitioner of a fair trial. We note, further, that this question was not presented to the courts

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[2] "App." refers to appellant's appendix in the court of appeals.

below. See *Lawn* v. *United States,* 355 U.S. 339, 362-363 n. 16.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD.
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

JOHN P. BURKE,
RICHARD B. BUHRMAN,
Attorneys.

APRIL 1973.